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UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte

MICHAEL CHARLES RAUFMAN and CARMIE S. MALONEY

Appeal 2008-1321¹
Application 10/664,373
Technology Center 3700

Decided: December 5, 2008

Before TONI R. SCHEINER, ERIC GRIMES, and FRANCISCO C. PRATS,
Administrative Patent Judges.

SCHEINER, *Administrative Patent Judge.*

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to a disposable absorbent article. The Examiner has rejected the claims as anticipated. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

STATEMENT OF THE CASE

¹ Heard November 6, 2008.

Claims 1 and 2 are pending and on appeal. The claims have not been argued separately and therefore stand or fall together. 37 C.F.R. § 41.37(c)(1)(vii). Claim 1 is representative and reads as follows:

1. A disposable absorbent article comprising:
 - (a) a chassis having a longitudinal central axis and a garment-facing surface and a body-facing surface, the chassis adapted to extend from a back waist area of a wearer to a front waist area of a wearer with the body-facing surface overlying the crotch area of the wearer, the chassis including a first waist region, a second waist region and a crotch region;
 - (b) a pair of side panels extending substantially laterally outwardly from respective edge portions of the second waist region of the article, the side panels each carrying a securing element for engagement with the garment-facing surface at the first waist region of the article for securing the article in a wearing position on the body of the wearer;
 - (c) a predetermined ornamental visual image consisting of a first image element and a second image element, wherein the first image element is joined to one of the pair of side panels and the second image element is joined to another of the pair of side panels, wherein when the side panels are secured to the first waist region the first and second image elements complete the predetermined ornamental visual image, and wherein the predetermined ornamental visual image is visible when the side panels are secured to the first waist region.

The Examiner rejected claims 1 and 2 under 35 U.S.C. § 102(e) as anticipated by Pozniak (U.S. Patent 6,045,543, issued April 4, 2000).

We affirm.

ISSUE ON APPEAL

The Examiner finds that Pozniak describes a disposable absorbent article with “a predetermined ornamental visual image consisting of a first image element [joined to one of a pair of side panels] and a second image

element . . . joined to another of the pair of side panels” where “the first and second image elements complete the predetermined ornamental visual image” when the side panels are secured to the waist region of the absorbent article (Ans. 3).

Appellants contend that the ornamental visual image of the claimed article “consists of and is completed by” first and second image elements on the side panels of the article “as opposed to (1) the indicia lines on the right side of the article of Pozniak; (2) the indicia lines on the left side of the article of Pozniak; and (3) the indicia lines in the middle of the article of Pozniak” (Reply. Br. 2).

The sole issue raised by this appeal is as follows: Have Appellants established that the “ornamental visual image,” consisting of first and second image elements on the side panels of the claimed article, is structurally distinguishable from the “indicia lines” on the left and right sides of Pozniak’s article?

FINDINGS OF FACT

FF1 Appellants invented a disposable absorbent article, e.g., a diaper, with two side panels extending from the back waist of the article. The two side panels are fasteners that engage the front waist area of the article and secure the article on the user’s body. Each of the side panels carries an “image element,” and when the two side panels are joined on the front of the article, the two image elements form a complete “predetermined ornamental visual image” which is visible on the outside of the article (Spec. 4: 29-30; claim 1).

FF2 The Specification teaches that the two image elements on the side panels “are visually complementary with each other to define a predetermined visual image to facilitate application of the . . . [side panels] to the outwardly-facing surface . . . for proper fit of the article relative to the body of the wearer” (Spec. 4: 27-30). The indicia on the side panels “also can attract the attention of the wearer during the application process” (Spec. 3: 28-29).

FF3 The Specification does not explicitly define the term “image element” or “predetermined ornamental visual image,” but Figure 8A, reproduced below, illustrates a form of “indictum” in which each fastener tab “includes one-half of a familiar visual image” (Spec. 21: 7-10):

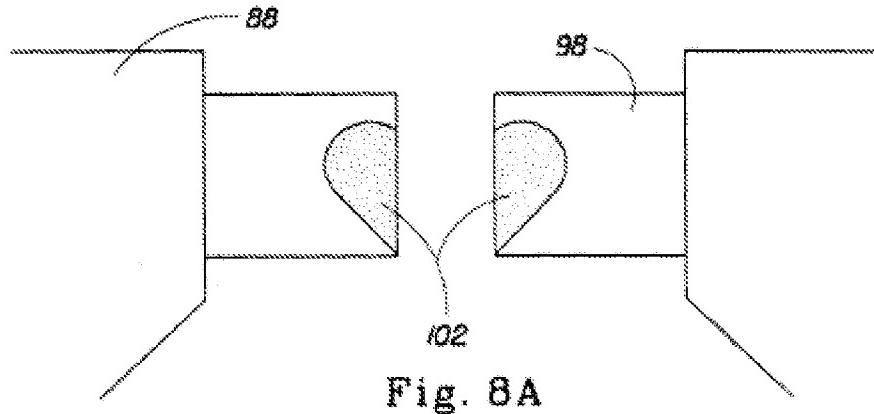


Figure 8A illustrates a portion of an absorbent article. “[E]ach fastener tab 98 includes one-half of a familiar visual image 102, in this instance a heart . . . If the fastener tabs 98 (or side panels 88) are properly and symmetrically positioned on the diaper, they will substantially complete the overall image of the heart” (Spec. 21: 9-17). “[A]n optional secondary positioning

indicium” can also be provided on the outwardly facing surface of the article. The secondary indicium will be overlain by the fastener tabs when the tabs are properly positioned (Spec. 21: 18-19).

FF4 Pozniak describes “alignment indicators for use with fastener systems” for personal care articles, e.g., diapers (Pozniak, col. 1, ll. 17-18).

FF5 Pozniak teaches that “fastening tabs extend outwardly from the substrate at opposing sides of the rear portion of the personal care article” (Pozniak, col. 2, ll. 22-23). First indicia on the front of the article cooperate with second indicia on the fastening tabs to “guide[] a user regarding positioning of the fastening tabs when the fastening tabs are secured to the front portion of the personal care article” (Pozniak, col. 2, ll. 36-43).

FF6 Pozniak teaches that

the first indicia comprise at least two lines parallel to each other, the second indicia comprise at least two lines on each fastening tab parallel to each other, the parallel lines in the first and second indicia on the front portion and on both tabs cooperating with each other to guide a user to bring the lines in the first and second indicia into alignment respectively with each other when the fastening tabs are secured to the front portion of the personal care article, thereby to give the appearance of two parallel lines extending across the fastening tabs and across substantially the entire front portion of the personal care article.

(Pozniak, col. 3, ll. 8-19.) In addition, the second indicia may physically overlie a portion of the first indicia when the fastening tabs are secured to the front portion of the article, to “give the appearance of a single, preferably

uninterrupted pair of lines extending across the fastening tabs and across substantially the entire front portion of [the] personal care article” (Pozniak, col. 6, ll. 14-22).

FF7 Pozniak’s indicia “preferably have bright colors so that the indicia are easily detected by a user” (Pozniak, col. 11, ll. 12-13), and can be easily aligned (Pozniak, col. 11, l. 26). For example, the indicia “can comprise five substantially parallel lines . . . comprising blue, green, yellow, orange, and red colors, respectively” (Pozniak, col. 11, ll. 21-23).

FF8 There is nothing to prevent the user from bringing the fastening tabs of Pozniak’s article together to meet in the middle. Directly aligning the colored parallel lines on one fastening tab with the colored parallel lines on the other fastening tab would give the appearance of uninterrupted differently colored parallel lines, even without the parallel lines on the front of the article. Thus, the indicia on Pozniak’s fastening tabs are “image elements” structurally capable of forming a complete “predetermined ornamental visual image” when brought together to overlie, i.e., cover, the matching parallel lines on the front of the article.

PRINCIPLES OF LAW

A statement of intended use in a product claim does not distinguish the claimed product from a prior art product structurally capable of performing the intended use, even if the prior art does not disclose that the product can be used in the manner recited in the claim. *See In re Schreiber*, 128 F.3d 1473, 1477 (Fed. Cir. 1997); *see also In re Casey*, 370 F.2d 576, 580 (CCPA 1967) (When claims are directed to an apparatus or machine

“[t]he manner or method in which such machine is to be utilized is not germane to the issue of patentability of the machine itself.”).

ANALYSIS

Essentially, Appellants contend that the ornamental visual image on the claimed article consists of, or is completed by, the two complementary image elements on the two side panels of the article, and nothing else, whereas the image on Pozniak’s article is not complete unless the image elements on the side panels are joined to either side of a third image element on the body of the article. (App. Br. 3-4; Reply Br. 2.)

This argument is not persuasive. Pozniak describes an article with an ornamental image made up of three indicia (or image elements), one on the body of the article, and two others on the fastening tabs (**FF5**). However, Pozniak’s image elements are differently colored, parallel lines (**FF6, 7**), and would form a completed image (continuous parallel lines) even without the image element on the body of the article, i.e., if the two fastening tabs were joined in the center of the article (**FF8**).

Thus, there is no structural difference between the claimed article and Pozniak’s article, only a difference in intended use. A difference in intended use is not sufficient to distinguish a claimed product from a prior art product structurally capable of performing the intended use, even if the prior art does not disclose that the product can be used in the manner recited in the claim.

CONCLUSION OF LAW

Appellants have not established that the “ornamental visual image” consisting of first and second image elements on the side panels of the claimed

article is structurally distinguishable from the “indicia lines” on the left and right fastening tabs of Pozniak’s article. Therefore, we find no error in the Examiner’s conclusion that Pozniak anticipates the claimed invention.

DECISION

We affirm the rejection of claims 1 and 2 under 35 U.S.C. § 102(e) as anticipated by Pozniak.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv)(2006).

AFFIRMED

cdc

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